

Mar 26, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRANDIE W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00111-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney Dana C. Madsen represents Brandie W. (Plaintiff); Special Assistant United States Attorney Danielle R. Mroczek represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS**, Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on November 25, 2014, Tr. 192, alleging disability since November 1, 2008, Tr. 194, due to bipolar disorder, lifting restrictions, depression, anxiety attacks, carpal tunnel/thumb tendentious left, and left shoulder injury, Tr. 220. The applications were denied initially and upon reconsideration. Tr. 107-10, 118-20.

1 Administrative Law Judge (ALJ) Donna L. Walker held hearings on September 15,
2 2016 and January 6, 2017 and heard testimony from Plaintiff, medical expert
3 Margaret Moore, Ph.D., and vocational expert Jeffrey Tittelfitz. Tr. 38-82. The
4 ALJ issued an unfavorable decision on February 8, 2017. Tr. 18-31. The Appeals
5 Council denied review on January 29, 2018. Tr. 1-6. The ALJ's February 8, 2017
6 decision became the final decision of the Commissioner, which is appealable to the
7 district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action
8 for judicial review on March 29, 2018. ECF Nos. 1, 4.

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in the administrative hearing transcript, the
11 ALJ's decision, and the briefs of the parties. They are only briefly summarized
12 here.

13 Plaintiff was 38 years old at the date of application. Tr. 194. At application,
14 Plaintiff reported that the highest grade she completed was the 11th grade and that
15 she received specialized job training in dog grooming. Tr. 221. She reported her
16 work history included care giving, cashiering, food preparation, housekeeping, and
17 providing security/ushering. *Id.* She reported that she stopped working on
18 November 1, 2008 due to her conditions. Tr. 220.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
25 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
27 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
28 another way, substantial evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
2 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
3 interpretation, the court may not substitute its judgment for that of the ALJ.
4 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
5 findings, or if conflicting evidence supports a finding of either disability or non-
6 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
7 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
8 evidence will be set aside if the proper legal standards were not applied in
9 weighing the evidence and making the decision. *Browner v. Secretary of Health*
10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
13 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
14 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
15 proof rests upon the claimant to establish a prima facie case of entitlement to
16 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
17 claimant establishes that physical or mental impairments prevent her from
18 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
19 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
20 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
21 other work, and (2) the claimant can perform specific jobs which exist in the
22 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
23 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
24 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

25 **ADMINISTRATIVE DECISION**

26 On February 8, 2017, the ALJ issued a decision finding Plaintiff was not
27 disabled as defined in the Social Security Act from November 25, 2014 through
28 the date of the decision.

1 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
2 activity since November 25, 2014, the date of application. Tr. 20.

3 At step two, the ALJ determined that Plaintiff had the following severe
4 impairments: muscle strain; trochanteric bursitis of the left hip; mild degenerative
5 L5 disc and facet disease/low back pain; depressive disorder, not otherwise
6 specified; amphetamine abuse/dependence in remission; anxiety disorder with
7 panic and agoraphobia; personality disorder, not otherwise specified; and
8 posttraumatic stress disorder. Tr. 20.

9 At step three, the ALJ found that Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr. 21.

12 At step four, the ALJ assessed Plaintiff's residual function capacity and
13 determined she could perform a range of medium work with the following
14 limitations:

15 the claimant can lift and/or carry up to 50 pounds occasionally (up to
16 1/3 of the workday), and 25 pounds frequently (up to 2/3 of the
17 workday). She has the ability to sit up to 6 hours and stand and/or walk
18 up to 6 hours. She has the unlimited ability to push or pull, other than
19 as stated for lift/carry. The claimant has the unlimited ability to finger
20 and feel, as well as reach in all directions, including overhead. She has
21 the ability to use her hands frequently for gross manipulation. The
22 claimant has the unlimited ability to balance, climb ramps, stairs, stoop
23 (i.e., bend at the waist), kneel, crouch, crawl, and climb ladders, ropes,
24 or scaffolds. She has the unlimited ability to see, hear and
25 communicate. She has the unlimited ability to be exposed to extreme
26 cold, extreme heat, wetness, humidity, noise, fumes, odors, dust, gases,
27 or poor ventilation, but should avoid concentrated exposure to vibration
28 and hazards, such as machinery and unprotected heights.

Regarding mental abilities, she has the ability to understand, remember
or apply information that is simple and routine. She has the ability to
learn, recall and use information to perform work activities that are
simple and routine.

1 Regarding interaction with others, she would work best in an
2 environment where she works in proximity to, but not close
3 cooperation, with co-workers and supervisors, and would work best
4 with superficial, or less, contact with the public. She has the ability to
5 cooperate with others, ask for help when needed, initiate or sustain
6 conversation, understand, and respond to social cues (physically,
7 verbally, or emotionally); respond appropriately to requests,
8 suggestions, criticism, correction and challenges.

9 Regarding the ability to concentrate, persist or maintain pace, the
10 claimant has the ability to focus attention on work activities and stay on
11 task at a sustained rate. She has the ability to initiate and perform tasks,
12 work at an appropriate and consistent pace; complete tasks in a timely
13 manner, and ignore or avoid distractions while working. She has the
14 ability to change activities or work settings without being disruptive.
15 She has the ability to sustain an ordinary routine and regularly attend
16 work; and work a full day without needing more than the allotted
17 number or length of rest periods during the day.

18 Regarding the ability to adapt or manage herself, the claimant has the
19 ability to regulate her emotions, control behavior, and maintain well-
20 being in a work setting. The claimant would work best in an
21 environment that is routine and predictable, but does have the ability to
22 respond to demands, adapt to changes, manage psychological
23 symptoms, distinguish between acceptable and unacceptable work
24 performance; set realistic goals, make plans independently of others, or
25 be aware of normal hazards and take appropriate precautions.

26 Tr. 23. The ALJ identified Plaintiff's past relevant work as cleaner/housekeeper
27 and found that she could perform this past relevant work. Tr. 29.

28 As an alternative to denying the claim at step four, the ALJ made a step five
determination that, considering Plaintiff's age, education, work experience and
residual functional capacity, and based on the testimony of the vocational expert,
there were other jobs that exist in significant numbers in the national economy
Plaintiff could perform, including the jobs of final assembler, small products
assembler II, and janitor. Tr. 30. The ALJ concluded Plaintiff was not under a

1 disability within the meaning of the Social Security Act from November 25, 2014,
2 through the date of the ALJ's decision. *Id.*

3 ISSUES

4 The question presented is whether substantial evidence supports the ALJ's
5 decision denying benefits and, if so, whether that decision is based on proper legal
6 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider her
7 symptom statements and (2) failing to properly consider the medical opinions in
8 the file. ECF No. 14. Additionally, Plaintiff argues that these errors are harmful
9 and a remand for an immediate award of benefits is warranted. *Id.*

10 DISCUSSION¹

11 1. Plaintiff's Symptom Statements

12 Plaintiff contests the ALJ's determination that Plaintiff's symptom
13 statements were unreliable. ECF No. 14 at 15-16.

14 It is generally the province of the ALJ to make determinations regarding the
15 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
16 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
17 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
18 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
19 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
20 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:

21
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 rather the ALJ must identify what testimony is not credible and what evidence
2 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

3 The ALJ found Plaintiff's statements concerning the intensity, persistence,
4 and limiting effects of her symptoms to be "not entirely consistent with the medical
5 evidence and other evidence in the record." Tr. 24. Specifically, the ALJ found
6 that (1) "The claimant's subjective complaints are not reasonably consistent with
7 the medical evidence," Tr. 24, and (2) "the claimant can perform a full range of
8 daily activities, which is inconsistent with the nature, severity, and subjective
9 complaints of the claimant," Tr. 26.

10 In Plaintiff's opening brief, she only challenges the ALJ's first reason for
11 rejecting her symptom statements, that they were inconsistent with the medical
12 evidence. ECF No. 14 at 15-16. In response, Defendant argues that the ALJ failed
13 to properly address all the reasons the ALJ provided for rejecting Plaintiff's
14 statements. ECF No. 15 at 3-5. Defendant argues that the ALJ rejected Plaintiff's
15 statements for five reasons: (1) they were inconsistent with the medical evidence;
16 (2) Plaintiff received conservative treatment; (3) her depression was controlled
17 with medication; (4) she stopped working because of her substance abuse, not her
18 impairments; and (5) her allegations were inconsistent with her reported activities.
19 ECF No. 15 at 3-6. Defendant asserts that by failing to challenge all five reasons
20 for rejecting Plaintiff's symptom statements, she has waived her right to do so. *Id.*
21 at 5.

22 While the ALJ discusses Plaintiff's conservative treatment, her depression
23 being controlled with medication, and the reasons she stopped working, she
24 references these circumstances when reviewing the medical evidence, without
25 relating them to Plaintiff's symptom statements. Tr. 24-25. As such these three
26 reasons are *post hoc* rationalizations, which will not be considered by this Court.
27 *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only
28 the reasons provided by the ALJ in the disability determination and may not affirm

1 the ALJ on a ground upon which he did not rely.”). The Court will only address
2 the reasons the ALJ specifically tied to Plaintiff’s symptom statements: (1) that her
3 statements were inconsistent with the medical evidence; and (2) that her statements
4 were inconsistent with her reported activities.

5 **A. Medical Evidence**

6 Plaintiff argues that her symptom statements are supported by the medical
7 evidence and, if they are not, that this reason alone is insufficient to support a
8 rejection of her statements. ECF No. 14 at 15-16.

9 An ALJ may cite inconsistencies between a claimant’s testimony and the
10 objective medical evidence in discounting the claimant’s symptom statements.
11 *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But this
12 cannot be the only reason provided by the ALJ. *See Lester*, 81 F.3d at 834 (ALJ
13 may not discredit the claimant’s testimony as to subjective symptoms merely
14 because they are unsupported by objective evidence); *see Rollins v. Massanari*,
15 261 F.3d 853, 857 (9th Cir. 2001) (Although it cannot serve as the sole reason for
16 rejecting a claimant’s credibility, objective medical evidence is a “relevant factor
17 in determining the severity of the claimant’s pain and its disabling effects.”).

18 Here, the ALJ summarized Plaintiff’s statements regarding her
19 musculoskeletal complaints and left wrist complaints. ECF No. 24. She then
20 summarized the medical evidence showing normal ambulation and mild findings.
21 Tr. 24-25. Plaintiff’s briefing did not identify what medical evidence the ALJ
22 found inconsistent with Plaintiff’s symptom statements, or why the ALJ erred in
23 finding that evidence was inconsistent. ECF No. 14 at 15. Because the ALJ set
24 forth the specific testimony that was undermined by the specific evidence, this
25 reason meets the specific, clear and convincing standard.

26 **B. Activities**

27 Plaintiff failed to challenge the ALJ’s determination that her reported
28 activities were inconsistent with her reported symptoms in her opening brief. ECF

No. 14. Therefore, she waived the argument. *See Carmickle*, 533 F.3d at 1161 n.2. The Ninth Circuit explained the necessity for providing specific argument:

The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. Particularly on appeal, we have held firm against considering arguments that are not briefed. But the term “brief” in the appellate context does not mean opaque nor is it an exercise in issue spotting. However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so. It is no accident that the Federal Rules of Appellate Procedure require the opening brief to contain the “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Fed. R. App. P. 28(a)(9)(A). We require contentions to be accompanied by reasons.

Independent Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003).²

Moreover, the Ninth Circuit has repeatedly admonished that the court will not “manufacture arguments for an appellant” and therefore will not consider claims that were not actually argued in appellant’s opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to challenge the issue in her opening brief, the court declines to consider this issue.

The Court will not disturb the ALJ’s determination regarding Plaintiff’s symptom statements.

2. Medical Opinions

Plaintiff argues the ALJ failed to properly consider and weigh the opinion evidence. ECF No. 14 at 16-17. Specifically, Plaintiff asserts that the ALJ erred in giving more weight to the opinions of non-examining, non-treating doctors over the opinion of Dr. Arnold. *Id.*

²Under the current version of the Federal Rules of Appellate Procedure, the appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 In weighing medical source opinions, the ALJ should distinguish between
2 three different types of physicians: (1) treating physicians, who actually treat the
3 claimant; (2) examining physicians, who examine but do not treat the claimant;
4 and, (3) nonexamining physicians who neither treat nor examine the claimant.
5 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
6 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
7 631. Likewise, the ALJ should give more weight to the opinion of an examining
8 physician than to the opinion of a nonexamining physician. *Id.*

9 When an examining physician's opinion is not contradicted by another
10 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
11 and when an examining physician's opinion is contradicted by another physician,
12 the ALJ is only required to provide "specific and legitimate reasons" to reject the
13 opinion. *Lester*, 81 F.3d at 830-31.

14 Here, Plaintiff failed to challenge the reasons the ALJ provided for rejecting
15 Dr. Arnold's opinion. ECF No. 14 at 16-17. Instead, she argues that the ALJ
16 should not have given weight to the non-examining, non-treating opinions. *Id.* An
17 ALJ is not required to provide an explanation for accepting an opinion but must
18 provide an explanation for rejecting an opinion. S.S.R. 96-8p ("The RFC
19 assessment must always consider and address medical source opinions. If the RFC
20 assessment conflicts with an opinion from a medical source, the adjudicator must
21 explain why the opinion was not adopted."). Because Plaintiff failed to challenge
22 the reasons the ALJ provided for rejecting Dr. Arnold's opinion, the Court will not
23 disturb the ALJ's treatment of the medical opinions. *See Carmickle*, 533 F.3d at
24 1161 n.2.

25 CONCLUSION

26 Having reviewed the record and the ALJ's findings, the Court finds the
27 ALJ's decision is supported by substantial evidence and free of harmful legal error.
28 Accordingly, **IT IS ORDERED:**

